

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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BANK OF AMERICA, N.A.,

Case No. 2:16-cv-01106-GMN-PAL

Plaintiff,

ORDER

TERRACES AT ROSE LAKE
HOMEOWNERS ASSOCIATION, et al.,

(Mot Stay – ECF No. 67)

Defendant.

12 Before the court is Bank of America, N.A.'s Motion to Stay All Discovery Pending
13 Resolution of Pending Motions for Summary Judgment (ECF No. 67). The court has considered
14 the motion, defendant Terraces at Rose Lake Homeowners Association's Opposition (ECF No.
15 75), SFR Investment Pool 1, LLC's Joinder (ECF No. 79), and plaintiff's Reply (ECF No. 82).

16 This case involves claims for quiet title/declaratory relief related to a non-judicial
17 homeowners' association foreclosure sale conducted pursuant to NRS 116. Bank of America,
18 N.A. ("BANA") filed a motion for summary judgment and an opposition to SFR's motion for
19 partial summary judgment on August 31, 2017. BANA argues the motion for summary judgment
20 and opposition raise two purely legal issues that can be resolved without discovery. Specifically,
21 the motions involve applicability of the federal foreclosure bar precluding an HOA sale from
22 extinguishing a property interest of the Federal National Mortgage Association ("Fannie Mae")
23 and preempts any contrary state law.

24 BANA maintains that two recent Ninth Circuit cases have held that the federal foreclosure
25 bar preempts Nevada law that would purport to allow an HOA foreclosure sale to extinguish a
26 property interest of Fannie Mae or Freddie Mac. These decisions held that even if the recorded
27 deed of trust owned by either names only the servicer of record as beneficiary, as in this case, the
28 federal foreclosure bar applies to prevent the HOA sale from extinguishing Fannie Mae's deed of

1 trust. The motion cites the Ninth Circuit's recent decisions in *Berezovsky v. Moniz*, __ F.3d __,
2 No. 16-15066, 2017 WL 3648519 (9th Cir. August 25, 2017) and *Elmer v. JPMorgan Chase &*
3 *Co.*, 2017 WL 3822061 *2 No. 15-17407 (9th Cir. August 31, 2017). Additionally, BANA argues
4 a stay is warranted because in *Bourne Valley* the Ninth Circuit held that the HOA foreclosure
5 provisions of NRS 116 is facially unconstitutional. *Bourne Valley Court Tr. v. Wells Fargo Bank*,
6 N.A., 832 F.3d 1154, 1159-60 (9th Cir. 2016). On June 26, 2017, the Supreme Court denied Bourne
7 Valley's petition for a writ of certiorari. BANA maintains that no discovery is required to resolve
8 the two issues addressed in the pending dispositive motions, and a "preliminary peek" of the merits
9 of the motion warrant the requested stay.

10 Defendant Terraces at Rose Lake HOA opposes the motion arguing BANA is attempting
11 to avoid the Nevada Supreme Court's holding in *SFR Investment Pool I, LLC v. U.S. Bank*, Nev.
12 Adv. Rep. 75, 334 P.3d 408, 418 (2014). This case was filed May 17, 2016. Following the
13 bankruptcy of one of the parties, the parties agreed to a global stay which the court approved on
14 March 9, 2017. The stay was lifted July 20, 2017, and an amended discovery plan was entered by
15 the court on August 9, 2017, giving the parties until November 17, 2017 to conduct discovery.
16 The HOA argues that stays of discovery while dispositive motions are pending are not favored in
17 this district. A decision on dispositive motions may take upwards of 120 days to fully brief and
18 decided. Although the court has broad discretionary power to control discovery, a party seeking a
19 stay has a heavy burden of making a strong showing why discovery should be denied. Filing a
20 non-frivolous dispositive motion in and of itself is insufficient. A preliminary peek of the
21 competing motions for partial summary judgment will reveal that SFR Investment's motion seeks
22 a determination only whether the "return doctrine" applies to the statute in this case. Although the
23 Ninth's Circuit's recent decision in *Berezovsky v. Moniz* is potentially dispositive of some issues,
24 Fannie May was not on recorded title at the time of the HOA foreclosure and not a party to this
25 case. Therefore, a factual issue exists as to when Fannie Mae actually acquired its interest.
26 Counsel for the HOA asserts there are "several other issues" that warrant discovery as well, but
27 does not state what those issues are. Under these circumstances, the HOA argues discovery should
28 not be stayed while dispositive motions are pending.

1 SFR filed a Joinder (ECF No. 79) incorporating the arguments and explanation of
2 discovery needed in defendant Terraces at Rose Lake Homeowners Association's opposition.

3 BANA filed a Reply (ECF No. 82) which points out that a stay was previously entered as
4 a result of the bankruptcy of Alessi & Koenig. After the bankruptcy court lifted the stay, this court
5 also lifted the stay and SFR and BANA filed competing motions for summary judgment on August
6 10, 2017, and August 31, 2017 respectively. In its opposition, the HOA recognizes that the
7 pending motions for partial summary judgment are potentially dispositive of some issues.
8 However, it argues that the court should deny the stay because there is an alleged fact issue
9 regarding Fannie Mae's ownership of the loan, and the court must determine the appropriate
10 remedy. The HOA also argues the court is bound by the Nevada Supreme Court's decision in *SFR*
11 *Investment Pool 1, LLC v. U.S. Bank*, 130 Nev. Rep. 75 334 P.3d 408, 418 (2014). However, the
12 HOA completely ignores the Ninth Circuit's opinion in *Bourne Valley* which found the Nevada
13 HOA foreclosure statute at issue is facially unconstitutional. The district judge assigned to this
14 case as well as three other district judges in this district have followed *Bourne Valley* holding that
15 an HOA foreclosure sale conducted under the unconstitutional version of the state foreclosure
16 statute cannot extinguish a deed of trust owned by Fannie Mae or Freddie Mac, that title acquired
17 through an HOA foreclosure is subject to the pre-existing Fannie Mae or Freddie Mac deed of
18 trust, and that any factual issue such as actual notice of the HOA foreclosure sale is irrelevant.

19 The reply asserts that the only possible factual issue after *Berezovsky* is whether the loan
20 was owned by Fannie Mae at the time of the foreclosure. In *Berezovsky*, the Ninth Circuit held
21 that Fannie Mae's database records were admissible business records and that, combined with an
22 explanatory declaration by a Fannie Mae employee, sufficient evidence for purposes of granting
23 summary judgment. Fannie Mae's business records have been disclosed. A summary judgement
24 motion has been filed and the accompanying testimony of its witness will conclusively prove when
25 Fannie Mae acquired the note and deed of trust, and that it was the owner of the note and deed of
26 trust at the time of the HOA foreclosure sale at issue. Therefore, the only remaining issues are
27 pure questions of law that require the court to interpret the federal foreclosure bar and determine
28 its preemptive effect on Nevada law. *Berezovsky* and *Bourne Valley* are binding, final, and

1 indisputably applicable to, and dispositive of, this case. The court should therefore grant the
2 motion to stay all discovery pending a resolution of dispositive motions (ECF No. 63-66, and 76-
3 78).

4 Having reviewed and considered the moving and responsive papers, as well as conducting
5 a “preliminary peek” of the dispositive motions, the court finds BANA has met its burden of
6 establishing a stay is warranted.

7 **IT IS ORDERED** that:

8 1. Bank of America, N.A.’s Motion to Stay All Discovery Pending Resolution of Pending
9 Motions for Summary Judgment (ECF No. 67) is **GRANTED**.
10 2. The parties shall meet and confer and submit a proposed discovery plan and scheduling
11 order within 14 days of decision of the last currently pending motion for summary
12 judgment in the event any of the parties’ claims survive.

13 DATED this 26th day of October, 2017.

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16 PEGGY A. JEEN
17 UNITED STATES MAGISTRATE JUDGE
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